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Supreme Court, U.S.
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No. 04-1298

In The Supreme Court of the United States

UNITEDHEALTH GROUP, INC.
f.k.a. United HealthCare Corporation, *et al.*,

Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether § 3 of the Federal Arbitration Act mandates a stay of nonarbitrable claims when they share a common issue with an arbitrable claim?

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STATEMENT OF THE CASE

In this nationwide class action, Respondents are thirteen doctors from Florida, California, Georgia, Colorado and Kentucky and five medical associations from California, Texas, Florida, Georgia and Louisiana. Petitioners are eight of the largest managed care companies in the country.[1]

When the Respondent doctors and class members treat Petitioners' insureds, they most often do so on a fee for service basis. When this is done pursuant to contract, the contracts promise to pay doctors for the covered, medically necessary services they render and prescribe a billing procedure based upon standardized HCFA-1500 forms that incorporate the American Medical Association's Current Procedural Terminology ("CPT") coding system, which assigns numerical codes to the kinds, combinations and intensity of services doctors provide. Petitioners also pay doctors with whom they have no contracts to treat their insureds in order to afford coverage in all geographic areas and specialties. Petitioners also require these doctors to bill on HCFA-1500 forms and represent that they will be paid in accordance with CPT coding guidelines.

Respondents and class members agree to treat the Petitioners' insureds on this basis, treat them, bill Petitioners rather than the insureds for their services, and bill in accordance with the CPT coding procedures Petitioners

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[1] The Eleventh Circuit affirmed the district court's class certification in part in *Klay v. Humana, Inc.*, 382 F. 3d 1241, 1276 (11th Cir. 2004), and the Court declined to issue a writ of certiorari. *UnitedHealth Group, Inc. v. Klay*, ___ U.S. ___, 125 S. Ct. 877 (2005).

specify. But the doctors are not paid in accordance with CPT coding guidelines. Instead, they are shorted by Petitioners, who have worked with computer software companies to develop automated claims processing systems that secretly alter CPT coding procedures to, for example, turn long office visits into short ones, a bilateral mastectomy into a single mastectomy, and multiple, discrete procedures into a single procedure.

To redress these grievances Respondents have asserted claims for conspiracy to commit violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. § 1962(d) through predicate acts of mail and wire fraud; aiding and abetting in the commission of RICO mail and wire fraud in violation of 18 U.S.C. § 2; RICO mail and wire fraud in violation of 18 U.S.C. § 1962(a) and (c); RICO declaratory and injunctive relief under 18 U.S.C. § 1964(a); relief pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(b); breach of contract; unjust enrichment; violation of various state prompt pay statutes; and violation of the fraudulent and unfair trade practice acts of Connecticut, New Jersey and California. (D.1607).[2]

[2] The only claims that remain at this juncture are Respondents' RICO conspiracy and aiding and abetting claims, their direct RICO claims against Humana, and their claim under § 17200 of the California Business and Professions Code. The district court dismissed Respondents' ERISA, statutory prompt pay and New Jersey Fraud Act claims, *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1298-1300, 1303-1305 (S.D. Fla. 2003). The Eleventh Circuit reversed certification of Respondents' breach of contract, unjust enrichment and state prompt pay claims. *Klay*, 382 F. 3d at 1261-1268. The Connecticut Unfair Trade Practice Claim was asserted only against Aetna, who has since settled.

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The complaints asserting these claims drew numerous motions to compel arbitration and resulted in three district court arbitration decisions. *In re Managed Care Litig.*, 132 F. Supp. 2d 989 (S.D. Fla. 2000); *In re Managed Care Litig.*, 143 F. Supp. 2d 1371 (S.D. Fla. 2001); *In re Managed Care Litig.*, 2003 WL 22410373 (S.D. Fla. 2003) (App. 1a). Appeals from these decisions resulted in two court of appeals arbitration decisions. *In re Humana Inc. Managed Care Litig.*, 285 F. 3d 971, 973 (11th Cir. 2002); *Klay v. All Defendants*, 389 F. 3d 1191 (11th Cir. 2004) (App. 29a).

These arbitration decisions resulted in several rulings. In its first arbitration decision, the district court held that the quantum meruit, unjust enrichment, breach of contract, and direct RICO and state statutory claims between Respondents and Petitioners with arbitration clauses covering the services at issue were arbitrable, *In re Managed Care*, 132 F. Supp. 2d at 1007-1008, and that, under principles of estoppel, this ruling would extend to services rendered by any Respondent affiliated with a group or entity that had an arbitration agreement as well as to services rendered to any subsidiary or affiliate of Petitioners pursuant to a contract with an arbitration clause. *Id.* at 996-997. The district court also declined to compel arbitration of two kinds of claims. The first were direct RICO claims against Petitioners United and PacifiCare, whose arbitration clauses precluded awards of punitive and/or extra-contractual damages. The district court believed this made it impossible for Respondents to obtain meaningful relief under RICO's treble damage

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And Respondents have determined to pursue direct RICO claims only against Defendant Humana. (D.3525, pp.2-3)

provisions and thus rendered the clauses unenforceable under the Eleventh Circuit's decision in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F. 3d 1054 (11th Cir. 1998). *In re Managed Care*, 132 F. Supp. 2d at 100-101, 1005.[3] The other claims the district court found to be nonarbitrable were Respondents' RICO conspiracy and aiding and abetting claims, which were being asserted against Petitioners with whom they had no contracts or no contracts covering the services at issue. The district court found that Respondents were not entitled to borrow each others' arbitration clauses under principles of estoppel, and that their own arbitration clauses did not cover claims stemming from contractual relationships with other managed care companies. *Id.* at 994-996, 1002-1008.

Petitioners appealed the district court's refusal to compel arbitration of Respondents' RICO conspiracy and aiding and abetting claims and direct RICO claims against United and PacifiCare, arguing that allegations of conspiracy and the related nature of claims meant that they should also be arbitrated under principles of estoppel and that, in any event, the nonarbitrable claims should have been stayed, either under § 3 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), or as a matter of discretion. The Eleventh Circuit affirmed all of the district court's rulings without discussing the issue of a stay. *In re Humana*, 285 F. 3d at 971.[4]

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[3] It was this decision that the Court ultimately reversed in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), holding that determining whether the contract provisions precluded an award of treble damages was a job for the arbitrators.

[4] At that point the district court had denied a motion for stay filed by Respondent PacifiCare, which was the subject of a separate appeal

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In response to the arbitration rulings of the district court and this Court in *PacifiCare*, Respondents filed an amended complaint eliminating the claims determined to be arbitrable by asserting direct claims only on behalf of doctors who treated Petitioners' insureds pursuant to contracts without arbitration clauses (Petitioner Humana, for example, did not routinely include arbitration clauses in its contracts) or without any contract at all (Respondents and class members include doctors that do not participate in Petitioners' provider networks but nonetheless treat their insureds). (D.1607, pp.41-42, 50, 52, 53, 54, 58). In addition, given the fact that it was economically impossible for thousands of doctors to prove Respondents' RICO violations and unravel the computer programs used to short them in separate arbitration proceedings seeking small amounts of money, Respondents determined that they could not, and have not, pursued any of their arbitrable claims.[5]

Petitioners' suggestion that this course of action somehow frustrated the Court's mandate in *PacifiCare* and otherwise deprived them of the benefit of their arbitration clauses is hard to fathom. Direct RICO claims against United and PacifiCare – which were the subject of

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that was consolidated with the main appeal. *In re Managed Care*, 143 F. Supp. 2d at 1375.

[5] A side show was created by Petitioners' attempt to arbitrate these claims anyway. The district court enjoined the effort (D.1705), and was reversed by the Eleventh Circuit. *Klay v. United Healthgroup, Inc.*, 376 F. 3d 1092 (11th Cir. 2004). Since the Respondents are not participating in these "arbitrations," they do not know whether Petitioners have pursued them since the Eleventh Circuit derided the effort as "nothing more than a moot court session." *Id.* at 1113. Petitioners' intent was/is presumably to obtain default or unopposed arbitration awards and argue that they have some preclusive effect.

the Court's decision in *PacifiCare* – are no longer being asserted, and the Petitioners' arbitration clauses have done yeoman's duty with respect to all of the arbitrable claims – not just moving them out of a judicial forum but making them disappear altogether.

The amended complaint prompted additional motions to compel arbitration, and in its third arbitration decision the district court affirmed its prior rulings concerning Respondents' RICO conspiracy and aiding and abetting claims, ruled for the first time that "non-par" doctors – doctors who did not participate in Petitioners' provider networks but treated their insureds without a contract – were not required to litigate their claims, stayed all arbitrable claims pursuant to § 3, and declined to stay Respondents' nonarbitrable claims on a discretionary basis. (App. 9a-17a, 24a). Respondents again appealed and the Eleventh Circuit affirmed, holding with respect to a stay of nonarbitrable claims that one was not required by § 3, and that the district court did not abuse its discretion in declining to enter one. (App. 46a-47a).

REASONS FOR DENYING THE PETITION

Petitioners urge the Court to grant the petition in this case to protect their arbitration rights under the FAA, to clarify the Court's position regarding whether § 3 mandates a stay of nonarbitrable claims that share issues with arbitrable claims, and to resolve a deepening conflict among the courts of appeals on the issue. As set forth below, none of these are valid reasons for granting the petition. Petitioners' arbitration rights are not being infringed. Those rights simply do not extend beyond their

contracts. The Court's position on the issue of whether nonarbitrable claims must be stayed in favor of related arbitrable claims has been made clear on at least two occasions. And the courts of appeals are neither divided nor confused on the issue. What Petitioners really seek is a seachange in the way the Court and the courts of appeals have balanced the rights of litigants and arbitrants who pursue related claims.

I. REVIEW WILL NOT FURTHER THE GOAL OF THE FEDERAL ARBITRATION ACT

The premise of the petition in this case is that the Court should interpret § 3 of the FAA to require a stay of nonarbitrable claims while related arbitrable claims proceed because Congress, in enacting the FAA, intended to place claims that are to be arbitrated on a higher, more favored plane than claims that are to be litigated. But that is not what Congress had in mind. The FAA was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985), and "to make arbitration agreements as enforceable as other contracts, *but not more so*," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

As a result, the Court has repeatedly stressed that the FAA does not favor arbitration, or any particular arbitration procedure – just the enforcement of private agreements to arbitrate according to their terms. *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the

enforceability, according to their terms, of private agreements to arbitrate."); *Byrd*, 470 U.S. at 219 ("The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements."). Indeed, in *Volt*, where the question was whether §§ 3 and 4 of the FAA trumped the parties' choice of a state procedure that required arbitrable claims to be stayed while nonarbitrable proceeded, the Court made it clear that no federal "arbitration rights" were being infringed because the parties' contract rights controlled. *Id.* at 476-478.

Here, Petitioners do not seek to have their arbitration agreements enforced like any other contract. Rather, by seeking to extend their reach via a stay to limit the rights of parties who never agreed to arbitrate and delay resolution of disputes that are not arbitrable, they impermissibly seek "more so."

II. THE COURT HAS ALREADY ADDRESSED THE ISSUE PETITIONERS RAISE

Section 3 of the Federal Arbitration Act provides that district courts shall stay suits brought "upon any issue referable to arbitration under an agreement in writing." Petitioners believe the word "issue" in § 3 refers to something less than the claim or dispute upon which suit is brought so that, even when the claim or dispute itself is not arbitrable, § 3 requires a stay if an issue subsumed therein is arbitrable in the context of a separate claim.[6]

[6] This reading of § 3 ignores both the fact that it requires the issue to be "referable to arbitration under an agreement in writing" – which issues between parties that have not agreed to arbitrate are not – and

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That is not, however, how the Court has interpreted § 3, or how it has determined that related arbitrable and nonarbitrable claims should proceed. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court analyzed the interplay between arbitrable and nonarbitrable claims under §§ 3 and 4 of the FAA to determine whether a district court's stay of an action to compel arbitration under § 4 in deference to parallel state court proceedings was proper under *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976). In the process the Court gave its view of what § 3 was intended to accomplish, making it clear that the disputes Congress intended to be stayed under § 3 were disputes that were arbitrable under § 4:

> . . . Congress's clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable *dispute* out of court and into arbitration as quickly and easily as possible. The Act provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a *dispute* referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4.

460 U.S. at 22 (emphasis added).[7]

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that § 3 requires that the stay "applicant [not be] in default in proceeding with such arbitration" – a clear indication that the stay applicant must be entitled to arbitrate the claim in the first place.

[7] Petitioners argue that the Court suggested otherwise by the language it used to describe § 3 in *Shearson/American Express, Inc. v. McMahon*, 480 U.S. 914 (1987), and *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). In *McMahon*, however, the issue was whether federal securities and RICO claims were arbitrable, not how arbitrable and nonarbitrable claims should proceed under the FAA. The language

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The Court also made it clear that the FAA contemplates that related disputes will proceed separately when some are arbitrable and some are not, and that whether nonarbitrable claims should be stayed in this scenario is a matter left to the discretion of the district court:

> The Hospital points out that it has two substantive disputes here – one with Mercury, concerning Mercury's claim for delay and impact costs, and the other with the Architect, concerning the Hospital's claim for indemnity for any liability it may have to Mercury. The latter dispute cannot be sent to arbitration without the Architect's consent, since there is no arbitration agreement between the Hospital and the Architect. It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement

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Petitioners quote simply paraphrased §§ 2, 3 and 4 of the Act on the way to reaching the issues at hand. 482 U.S. at 226. And in *EEOC* the Court actually reversed a § 3 stay of the *EEOC's* enforcement action because it was not arbitrable under the employee's contract with his employer. The claim was dependent upon the employee's own claim, and a stay would have been required under Petitioners' interpretation of § 3. Similarly, Petitioners' reliance on the Court's statement in *The Anaconda v. American Sugar Ref. Co.*, 322 U.S. 42, 45 (1944), that "if a stay be granted [under § 3], the plaintiff can never get relief unless he proceeds to arbitration" is also misplaced. The plaintiff in a nonarbitrable claim is not supposed to "proceed to arbitration," again making it clear that the claims to be stayed are the claims that must be arbitrated.

> must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.
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> * * *
>
> In some cases, of course, it may be advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration. That decision is one left to the district court . . . as a matter of its discretion to control its docket.

460 U.S. at 19-20 n.23 (emphasis in original) (citations omitted).

The Court also made it clear that related arbitrable and nonarbitrable claims should both proceed in *Dean Witter v. Byrd*. Belying the notion that § 3 requires a stay of nonarbitrable claims, for years courts of appeals did just the opposite – staying or refusing to compel arbitration of arbitrable claims so that related nonarbitrable claims could proceed first. 470 U.S. at 216, 222 n.9. The Court struck down this practice in *Byrd*, but found "no reason to . . . manipulate the ordering of the resulting bifurcated proceedings . . . . " *Id.* at 223. Justice White drove the point home in his concurring opinion:

> [O]nce it is decided that two proceedings are to go forward independently, the concern for speedy resolution suggests that neither should be delayed. While the impossibility of the lawyers being in two places at once may require some accommodation in scheduling, it seems to me that the heavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course.

Id. at 1245.

III. THERE IS NO DEEPENING DIVIDE OR GROWING CONFUSION AMONG THE COURTS OF APPEALS OVER WHETHER § 3 MANDATES A STAY OF NONARBITRABLE CLAIMS

The conflict Petitioners perceive among the courts of appeals does not exist. No court of appeals holds that § 3 mandates a stay of nonarbitrable claims when they share an issue with arbitrable claims. Rather, in keeping with the Court's teachings in *Moses H. Cone* and *Byrd*, the courts of appeals that have addressed the issue hold that the question of whether nonarbitrable claims should be stayed in this circumstance is one left to the sound discretion of the district court.[8]

While Petitioners acknowledge that, along with the Eleventh, the First, Second and Fourth Circuits follow this approach,[9] the Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits do as well. *See, e.g., Glazer v. Lehman Bros, Inc.*, 394 F. 3d 444, 451 (6th Cir. 2005) ("[I]f the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending

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[8] Neither the Third nor the Tenth Circuit have addressed the issue. Petitioners suggest that the Third Circuit has, citing *Lloyd v. Hovensa, LLC*, 369 F. 3d 263 (3d Cir. 2004), as one of the cases that demonstrate conflict among the courts of appeals. The issue in *Lloyd*, however, was whether arbitrable claims could be dismissed rather than stayed under § 3, not whether nonarbitrable claims must be stayed when they share a common issue with an arbitrable claim. *Id.* at 269.

[9] *See, e.g., McCarthy v. Azure*, 22 F. 3d 351, 361 (1st Cir. 1994); *Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S*, 943 F. 2d 220, 224-225 (2d Cir. 1991); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F. 2d 840, 856 (2d Cir. 1987); *S.A. Mineracao Da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F. 2d 190, 196-197 (2d Cir. 1984); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F. 3d 88, 96-97 (4th Cir. 1996).

arbitration.") (*quoting Stout v. J.D. Byrider*, 228 F. 3d 709, 714 (6th Cir. 2000); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F. 3d 537, 542 (7th Cir. 1998); *Pryner v. Tractor Supply Co.*, 109 F. 3d 354, 361 (7th Cir. 1997) (the cases "treat the question of whether to stay the entire case as discretionary in cases involving both arbitrable and nonarbitrable issues"); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F. 3d 524, 529-301 (7th Cir. 1996) ("Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay, in order to be entitled to a stay under the arbitration act, must be a party to the agreement to arbitrate, as must be the person sought to be stayed.");[10] *AgGrow Oils, L.L.C. v. National Union Fire Ins. Co.*, 242 F. 3d 777, 782 (8th Cir. 2001) (absent a requirement to arbitrate one "is not entitled to a mandatory stay under section 3 of the Act"); *United Communications Hub, Inc. v. Qwest Communications, Inc.*, 2002 WL 1963592, *3 (9th Cir. 2002) ("The decision whether to stay the nonarbitrable issues . . . pending arbitration rests with the sound discretion of the district court."); *ATSA of Calif., Inc. v. Continental Ins. Co.*, 702 F. 2d 172, 176 (9th Cir. 1983) (same); *DSMC, Inc. v. Convera Corp.*, 349 F. 3d 679, 684-685 (D.C. Cir. 2003) ("District courts may certainly consider stays . . . [but] the mandatory stay provision of

[10] It was in this case that the Seventh Circuit receded from *Kroll v. Doctor's Assocs., Inc.*, 3 F. 3d 1167, 1171 (7th Cir. 1993), and *Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp.*, 916 F. 2d 402, 407 (7th Cir. 1990), the earlier decisions which Petitioners rely upon in their conflict analysis. *See, e.g., Ross v. Health & Ret. Properties Trust*, 703 N.E. 2d 734, 739 n.8 (Mass. App. 1998) (*Morrie Mages* and *Kroll* "implicitly overruled by the holding in *IDS Life*"); *In re Oakwood Mobile Homes, Inc.*, 1999 WL 1073846, *4 n.3 (Tex.App. 1999) ("*Morrie Mages* was overruled by the Seventh Circuit in *IDS Life*. . . . ").

Section 3 does not apply to litigation involving parties not subject to a written arbitration agreement . . . . ").

Indeed, the only variation to be found lies within the Fifth Circuit. While it has long followed the same rule as the other courts of appeals,[11] and continues to acknowledge the general rule that only parties required to arbitrate are subject to a § 3 stay, *see, e.g., Hill v. GE Power Sys., Inc.*, 282 F. 3d 343, 346 (5th Cir. 2002) ("In general, Section 3 only applies to parties to an agreement containing an arbitration clause."), several panels in the Fifth Circuit have recently held that under certain circumstances involving related parties an exception should be made and a stay entered under § 3. *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F. 3d 339 (5th Cir. 2004) (subsidiary entitled to stay under parent's arbitration agreement); *Hill*, 282 F. 3d at 348 (principal entitled to stay under agent's arbitration clause); *Harvey v. Joyce*, 199 F. 3d 790 (5th Cir. 2000) (closed corporation entitled to stay under shareholders' arbitration agreement); *Subway Equip. Leasing Corp. v. Forte*, 169 F. 3d 324 (5th Cir. 1999) (corporation entitled to stay under affiliated corporation's arbitration agreement). The Fifth Circuit's own take on these cases is that, while they are the result of "exceptional circumstances," they muddy the clarity of the general rule and create "tension in our case

[11] *E.g., Zimmerman v. International Cos. and Consulting, Inc.*, 107 F. 3d 344, 346 (5th Cir. 1997) ("[T]he mandatory stay provision of the FAA does not apply to those who are not contractually bound by the arbitration agreement."); *In re Complaint of Hornbeck Offshore (1984) Corp.*, 981 F. 2d 752, 755 (5th Cir. 1993) (same); *In re Matter of Talbott Big Foot, Inc.*, 887 F. 2d 611, 614 (5th Cir. 1989) (same); *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F. 2d 198, 203 n.61 (5th Cir. 1985) (same).

law." *Adams v. Georgia Gulf Corp.*, 237 F. 3d 538, 540-541 (5th Cir. 2001).

Whatever the outcome of this debate, it is an intracircuit debate whose resolution, if appropriate at all, is not appropriate in this case. This is particularly true since the concerns which led to the exceptional entry of § 3 stays *Waste Mgmt., Hill, Harvey* and *Subway* were addressed in this case, as they normally are, in the context determining whether a discretionary stay is warranted,[12] or whether the litigants should be bound by or entitled to invoke the arbitration clauses of others (and thus be entitled to a § 3 stay) under principles of contract or estoppel. *See* App. 46a-47a; *In re Humana*, 285 F. 3d at 974-977; *In re Managed Care*, 132 F. Supp. 2d at 994-996.

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[12] That may in fact be what happened in *Harvey* and *Subway*. Both decisions relied on the Fifth Circuit's earlier decision in *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F. 2d 679, 681 (5th Cir. 1976), to justify the stay of nonarbitrable claims. There the court held that related antitrust claims should proceed to trial (impossible if § 3 mandated a stay of related claims), but that "the trial court had *discretion* to include Eteco's parent and successor corporations in its stay order, even though they were not formally parties to the 1960 contract." *Id.* at 681. (emphasis added).

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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